TE CHENG HOI

v.

PEH IM KWENG

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[CIVIL SUIT NO. 22-419-80]
11 APRIL 1994

PRACTICE & PROCEDURE: Plaintiff filing writ of summons and obtaining injunction - Plaintiff failing to file statement of claim - Defendant applying to strike off plaintiff's suit for default in filing statement of claim - Application to dismiss action for want of prosecution - Principles applicable - Consideration of O. 19 r. 1, O. 34 r. 2(2), r. 8 Rules of the High Court 1980.

The plaintiff had filed a generally indorsed writ dated 16 November 1990 praying for certain reliefs in respect of a piece of land. The plaintiff obtained an *ex parte* injunction in terms of the prayers in the writ which injunction was varied at the *inter partes* hearing.

On 24 November 1993 the defendant applied for the plaintiff's suit to be struck off under O. 19 r. 1 for having defaulted in filing the statement of claim and under the inherent jurisdiction of the Court for want of prosecution. Subsequent to the filing of the defendant's application, the plaintiff filed his statement of claim dated 30 November 1993.

Held:

[1] The plaintiff's delay of 3 years in filing the statement of claim is unduly long, inordinate, excessive and inexcusable in the circumstances, as he had offered no satisfactory explanation save to say that the matter was previously handled by former solicitors and there were negotiations to settle the claim. The plaintiff's conduct is reprehensible when one considers that for years after he had obtained an *ex parte* interim injunction, he neither thought it fit nor felt obliged to render particulars of his claim to justify the injunction that he had secured from the Court.

[2] Due to the peculiar nature of the claim whereby a claim for ejectment formed no part of the claim, the plaintiff's delay in filing the statement of claim was intentional and contumelious. By maintaining the benefit of the post-injunction *status quo* for years without a statement of his claim, the plaintiff had used the Court process to prolong the litigation in order to exhaust the defendant's finances and thus to force the defendant to quit on his own.

[3] The delay is that much more contumelious when the Court has to consider that the plaintiff had secured the benefits of an interim injunction, upon a discretion exercisable by the Court only in very exceptional circumstances, in the absence of a statement of claim.

[4] Even in the statement of claim that was filed post-application to dismiss, the plaintiff had failed to disclose with sufficient particularity the plaintiff's actual cause of action. As there was no claim for vacant possession, the injunction obtained by the plaintiff was in effect an indirect attempt to secure the effect of an ejectment order without expressly claiming for same.

[5] The prolonged and inexcusable delay has also done grave injustice to the defendant in that the defendant was, for a period of over three years, left without knowing what form the plaintiff's claim would take. As the plaintiff's claim did not seek to oust the defendant from occupation of the said land, this unresolved and unsatisfactory *status quo* should not be allowed to continue *ad infinitum*.

[6] In any event it is settled law that an inordinate delay in filing pleadings would as a rule attract the natural inference that serious prejudice has been thereby caused to the defendant by the delay and there was nothing in the plaintiff's affidavits to rebut this inference in favour of the defendant.

[7] The granting of the injunction must necessarily have been based on the implicit undertaking by the plaintiff to file his statement of claim as soon as possible. The plaintiff's explanation for the delay in filing the statement of claim, that there were ongoing negotiations for settlement between the parties, only served to reinforce the Court's suspicion that the then primary aim of the plaintiff's action in filing only the generally indorsed writ of summons was to secure an interim injunction and thereafter to wait to see what he could get from the defendant.

Obiter:

An application for an interim injunction is not normally entertained by the Courts without the concurrent filing of a specially endorsed claim, save in exceptional cases of

great urgency, and even then, upon Counsel's undertaking to file the claim as soon as possible thereafter. In the event that such an injunction is granted under such special circumstances, the details of the plaintiff's claim ought to be filed well within the 14 days life span of the interim injunction.

As the relief of injunction is an equitable remedy and *laches* on the part of a party affects such remedy, a default in filing the plaintiff's claim within the 14 days period ought, considering the circumstances of such granting of interim injunction, to be deemed an inordinate delay.

[Defendant's application to strike out the plaintiff's claim allowed with costs].

Cases referred to:

Clough & Ors. v. Clough & Ors. [1968] 1 All ER 1179 ***(foll)***

Bliss v. Lambeth, Southwark and Lewisham Area Health Authority (Teaching) [1978] 1 WLR 382 p. 389 ***(refd)***

Wallersteiner v. Moir [1974] 3 All ER 217 ***(refd)***

Berkett v. James [1978] AC 297 ***(refd)***

Vasudevan v. T. Damadaran & Anor. [1981] 2 MLJ 150 ***(foll)***

Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152 ***(refd)***

Hytrac Conveyors Ltd. v. Conveyors International Ltd. & Ors. [1982] 2 ALL ER 416 ***(foll)***

Lim Gait Tong v. Peninsular Land Development Bhd. & Anor. [1982] 1 MLJ 330 ***(refd)***

Datuk Samy Vellu v. Karpal Singh [1989] 3 MLJ 493 ***(refd)***

Leong Seng Kiat v. Law Peng Guan & Ors.[1992] 2 CLJ 825 ***(refd)***

Confidence Concrete Sdn. Bhd [1994] 1 MLJ 465 ***(refd)***

Thong Chuan Ching & Anor. v. Toshiba Electronic Malaysia Sdn. Bhd. [1983] 1 MLJ 254 ***(refd)***

Allen v. Sir Alfred McAlpine & Sons Ltd. [1968] 2 QB 229 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 19 r. 1, O. 25 r. 1(4), O. 34 rr. 2(2), 8, O. 89

For the plaintiff - John Khoo; M/s. Ismail, Khoo & Associates

For the defendant - R. Rajasingam; M/s. Rajasingam & Co.

JUDGMENT

Vincent Ng Kim Khoay J:

The plaintiff had, through his former solicitors, filed a generally indorsed writ of summons (Generally Indorsed Writ) dated 16 November 1990 (Encl.1) praying for certain reliefs in respect of a piece of land known as Lot No. 44, Mukim 14, North East District, Penang (the said land).

By a summons-in-chambers (Encl.62) the defendant had applied for the plaintiff's suit herein to be struck off under O. 19 r. 1 for having defaulted in filing a statement of claim and under the inherent jurisdiction of the Court for want of prosecution, on the grounds which appear sufficiently in the affidavit of the defendant Peh Im Kweng affirmed on 23 November 1993 (Encl. 61). It was opposed by the plaintiff on grounds appearing in his affidavit affirmed on 15 December 1993 (Encl. 66).

There was also an application by the plaintif (Encl. 65) for an order that the defendant pay certain amounts of income allegedly earned from the said land to the plaintiff or alternatively, that such amounts be deposited in Court (presumably until outcome of the trial of the suit).

It was agreed that Encl. 62 should be heard first and the Court could then immediately proceed to hear encl. 65 should the defendant fail in enclosure 62.

The Generally Indorsed Writ (enclosure 1) had *inter alia* prayed for:

(1) an injunction to restrain the defendant by himself, his servants or agents or otherwise howsoever from doing the following acts or any of them that is to say:

(a) preventing the plaintiff, his servants or agents from having access to all that land known as Lot No. 44, Mukim 14, North East District, Penang or any part thereof;

(b) preventing or attempting in any other way to prevent the plaintiff, his servants or agents from harvesting and marketing the fruits harvested from the said land;

(c) selling, disposing of or in any way dealing with the fruit trees on the said land or any of them or the fruits harvested from the said fruit trees;

(d) clearing the said land or any part thereof and replanting the same with new fruit trees or plants.

(2) Damages

(3) An account of all sales by the defendant of all fruits harvested from the said land from 1 February 1990 onwards.
(4) Payment of the amount found to be due to the plaintiff on the taking of such account and interest thereon at such rate and for such period as the Court shall think fit.
(5) Costs.

Enclosure 1 appears to have been filed for the purpose of obtaining - and the plaintiff did obtain - an *exparte* interim injunction (Encl.7) dated 23 November 1990 whereby prayer 1(a) to (d) of the generally indorsed writ was granted.

Subsequently, upon a hearing *inter partes* on 25 May 1991, the interim injunction was varied to the extent that the plaintiff undertook not to do any work on the said land and to allow the defendant to harvest the fruits on the land subject to accounts in writing being rendered by the defendant showing income derived from and expenses incurred in respect of the said land.

On 24 November 1993 the defendant filed the current application under Encl.62 for the plaintiff's claim to be struck off for want of prosecution. Only thereafter, that is, subsequent to the filing of this application was the plaintiff moved to file his statement of claim dated 30 November 1993 (Encl.63). In Enclosure 63 the plaintiff had:

(i) asserted that he was the registered owner of the title to the said land;
(ii) acknowledged that the said land had been leased to the defendant's father by its former owner by virtue of lease agreements dated 15 February 1955, 15 February 1958, 22 March 1960, 15 February 1964, 15 January 1967 and 15 January 1970; and
(iii) asserted that the defendant's father had continued to work on the land after 1970 but without any lease, and as a trespasser.

Clause 18 of Enclosure 63 apparently discloses for the first time that the objective or subject matter of the suit was a claim for income from the durian trees grown on the said land, as it was stated therein that "the estimated yield or income of the defendants from the said land on the sale of durians, during the durian season was between RM400 to RM500 per day."

The prayers for the injunction and damages expressed in Encl.63 were the same as set out in Enclosure 1 filed 3 years and 10 days earlier.

Quite strangely, the plaintiff made no claim for vacant possession of the land (which at any rate could have been instituted in the lower Court) considering that the defendant had never disputed the plaintiff's title.

The principles involved pertaining to the exercise of the Court's discretion in an application under O. 19 r. 1, O. 34 r. 2(2), r. 8 of the Rules of the High Court 1980 (RHC) and the inherent jurisdiction of the Court, for the dismissal of an action for want of prosecution are common and could be distilled from a welter of English and Malaysian cases namely:

(1) *Clough & Ors.* [1968] 1 All ER 1179
(2) *Bliss v. Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* [1978] 1 WLR 382, at page 389.
(3) *Wallersteiner v. Moir* [1974] 3 All ER 217
(4) *Berkett v. James* [1978] AC 297
(5) *Vasudevan v. T.Damodaran & Anor.* [1981] 2 MLJ 150.
(6) *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152
(7) *Hytrac Conveyors Ltd* [1982] 3 All ER 416
(8) *Lim Gait Tong v. Peninsular Land Development Bhd & Anor* [1982] 1 MLJ 330.
(9) *Datuk Samy Vellu v. Karpal Singh* [1989] 3 MLJ 493
(10) *Leong Seng Kiat v. Law Peng Guan & Ors.* [1992] 2 CLJ 825 and
(11) *Confidence Concrete Sdn. Bhd v. Shimizu-Peremba Sdn. Bhd.* [1994] 1 MLJ 465.

The Court is guided by the following principles culled from the above cases:

(1) The Court possesses an **express power** under O. 34 r. 8(2) and r. 2(2) exercisable in the event of a plaintiff's gross delay or non-compliance with certain Rules of the High Court 1980 governing the period for compliance with certain procedures essential for expeditious disposal of the case, e.g. delivery of a statement of claim (under O. 19 r. 1), taking out a summons for directions (under O. 25 r. 1(4) and the case of *Leong Seng Kiat (ibid))*, setting down for trial [under O. 34 r. 2 and see case of *Thong Chuan Ching & Anor. v. Toshiba Electronic Malaysia Sdn Bhd* [1983] 1 MLJ 254], and also **an inherent power** to dismiss actions which are not being pursued with sufficient expedition.

(2) The express and inherent powers should not be exercised unless the Court is satisfied either that the default has been intentional and

contumelious (in *Allen* and in *Vasudevan* (*ibid*)) or that the delay has been inordinate and inexcusable on the part of the plaintiff or his legal advisers and such delay is likely to impair a fair trial or to cause or to have caused, serious prejudice to the defendants either as between themselves, or themselves and the plaintiff or between them and the third party (in *Allen (ibid)*).

(3) Purely for practical reasons, and not as a matter of principle, the power to dismiss should not normally be exercised during the currency of the limitation period of the cause of action. (See *Vasudevan's* case.) However, no burden is placed on the defendant to show that such limitation period has expired. The non-expiry of the limitation period may influence the Court not to dismiss an action that is pending as the plaintiff may then file a fresh action immediately following such dismissal. (See *Berkett v. James (ibid)*). But on the other hand, the Court may also dismiss an action where the substantive cause of action is not subject to the statutory limitation period (See *Toh Hock Thye & Ors. (ibid)* - at page 154, last paragraph).

(4) On the question of inordinate or inexcusable delay, the general rule is that unless and until credible excuse is made out the natural inference would be that it is inexcusable, and it is for the plaintiff to discharge this inference. (See *Allen's* case which was cited with approval in *Vasudevan's* case).

(5) Also, if the delay is *ex facie* inordinate, the inference is that such delay is likely to cause or has caused serious prejudice to the defendants (See *Vasudevan's* case). That the plaintiff's inordinate and inexcusable delay can give rise to a grave risk of the defendant not having a fair trial because his important witnesses whose evidence is crucial to his case may die or disappear, is clearly illustrated by the facts of the case of *Lim Gait Tong v. Peninsular Land Development Bhd. & Anor. (ibid).*

(6) Such prejudice to the defendant is not limited to death or disappearance of witnesses or their fading memories or to the loss or destruction of records but also to the uncertainty of the action hanging over his head indefinitely, not knowing when it was going to be brought to trial. (See *Biss v. Lambeth (ibid)*).

(7) An inordinate or inexcusable delay is not confined to the action or inaction of the plaintiff himself but also to that of his lawyer. (See *Toh Hock Thye (ibid)*).

(8) Where the plaintiff has maintained an action neither desiring nor intending to bring it to trial but hoping e.g. to place a gag on his critics, (See *Wallersteiner's* case) or, in my view, to secure an injunction against the defendant and thereafter to maintain the *status quo,* this would amount to abuse of the process of Court and would show that the delay had been inordinate and inexcusable and had prejudiced the fair trial of the action.

(9) The delivery of the statement of claim by the plaintiffs following an inordinate delay and after the defendant had taken out a summons to dismiss for want of prosecution, would plainly show that the delay was intentional and contumelious and which would justify a dismissal of the case for want of prosecution. (See the case of *Clough & Ors.* and *Hytrac Conveyors Ltd (ibid)*). And similarly, in my view, the plaintiff's position would also be considerably weakened if after an inordinate delay he takes steps to set down the case for trial only after the defendant had taken out summons to dismiss his claim for want of prosecution. This conduct would show that the plaintiff had let the action go to sleep, and had it not been for the defendant's solicitors action in applying to dismiss the suit the plaintiff would still not have been aroused from his slumber.

(10) This Court is also of the opinion that even if the application to dismiss the claim is not allowed by the Court on the grounds that the plaintiff had, following the application to dismiss the claim, set the action down for trial, the Court may yet award costs for the application to the defendant in the exercise of its discretion clearly provided under O. 34 r. 2(2) and r. 8(1), for having assisted the Court to arouse the plaintiff from his slumber by an application to strike off.

(11) Where the plaintiff receives a show cause notice from the Court why their action should not be dismissed for want of prosecution, a failure to explain his non-compliance is nothing but intentional and contumelious act, disrespectful of the Court. (See Federal Court case of *Toh Hock Thye (ibid)*).

During the last decade the English Courts have become more willing to dismiss an action for want of prosecution. In the light of the above

cases it can be seen that Malaysian Courts like their English counterparts are now also quite ready to strike down an inactive and dilatory plaintiff if he does not prosecute his case with due expedition. This salutary power of the Court to dismiss cases for want of prosecution if exercised according to principles laid down by the above-mentioned authorities would help to reduce delays, clear backlog of cases and conduct itself within the right side of the maxim that justice delayed is justice denied. An indolent plaintiff should not be tolerated as this may cause injustice to the defendant in terms of the availability and usability of his important witnesses and documentary evidence. It is nevertheless recognised that the dismissal of an action for want of prosecution does not operate as *res judicata* for being not a decision on the merits of the case.

Applying the principles adumbrated above and after hearing Counsels, perusing the relevant affidavits and pleadings I hold as follows:

The plaintiff's delay of 3 years in filing the statement of claim is unduly long, inordinate, excessive and inexcusable in the circumstances, as he had offered no satisfactory explanation save to say that the matter was previously handled by former solicitors and there were negotiations to settle the claim. His conduct is reprehensible when one considers that for years after he had obtained an *ex-parte* interim injunction (as subsequently varied) yet he neither thought it fit nor felt obliged to render particulars of his claim to justify this injunction that he had secured from the Court.

Due to the peculiar nature of the claim whereby a claim for ejectment formed no part of the claim (neither is it an O. 89 application) this Court accepts the contention of the defendant's Counsel that the plaintiff's delay in filing the statement of claim was intentional and contumelious; and by maintaining the benefit of the post-injunction *status quo* for years without a statement of his claim, the plaintiff had used the Court process to prolong a litigation in order to exhaust the defendant's finances and thus to force the defendant to quit on his own. See *Wallersteiner v. Moir (ibid).* The delay is that much more contumelious when the Court has to consider that the plaintiff had secured the benefits of an interim injunction (it being an equitable relief) upon a discretion exercisable by the Court only in very exceptional circumstances in the absence of a statement of claim.

The plaintiff by their inaction had fallen into deep slumber and the contents of Enclosure 61 and Enclosure 66 points to a conduct which was clearly intentional and contumelious and which fell within the guiding propositions enunciated by Salmon LJ in *Allen (ibid).* The Court should not assist or condone indolence of any party, thereby slowing the speedy disposal of the action in Court.

Even in the statement of claim that was eventually filed post-application to dismiss, the plaintiff had failed to disclose with sufficient particularity the plaintiff's actual cause of action. Here, it must be noted that the plaintiff admitted in his statement of claim that the defendant's father had come on to the land legally in the early part of 1955. This would indicate that in all probability the durian trees, from which the plaintiff now claims its fruits, were planted and cultivated by the defendant's father. As there was no claim for vacant possession, the injunction obtained by the plaintiff was in effect an indirect attempt to secure the effect of an ejectment order without expressly claiming for same.

The plaintiff's position was further weakened when one considers the fact that the statement of claim was filed after the application to strike off. This case falls fairly and squarely within the principles stated in *Clough and Ors. v. Clough and Ors. (ibid)* and *Hytrac Conveyors Ltd v. Conveyors International Ltd & Ors. (ibid)* which I wholly agree with and adopt.

This prolonged and inexcusable delay has also, I think, done grave injustice to the defendant in that the defendant was, for the period of over 3 years, left without knowing what form the plaintiff's claim would take; whether it would eventually be an action for ejectment or a mere claim for the yield or fruits harvested from the plaintiff's land, thus leaving the defendant with nothing for his toil and labour on the said land which was apparently cultivated by the latter's father. And, as the plaintiff's claim did not seek to oust the defendant from occupation of the said land, this unresolved and unsatisfactory *status quo* should not be allowed to continue *ad inifinitum*; not to mention the prejudice in having an action hanging over the defendant's head indefinitely, not knowing when it is going to be brought to trial.

Indeed, a study of all the relevant pleadings and affidavits and hearing of oral submissions of

Counsels have revealed to me a sorry and outrageous state of affairs which called for the Court's intervention.

Besides the above factors that ought to be considered in favour of the defendant it is now settled that an inordinate delay in filing pleadings would also as a rule attract the natural inference that serious prejudice (which increases with the length of delay) has been thereby caused to the defendant by the delay. See *Allen v. Sir Alfred Mcalpine & Sons Ltd (ibid)*; in any event, there was nothing in the plaintiff's affidavits to rebut this inference in favour of the defendant.

It is said that since the nature of common law procedure for civil litigation is not inquisitorial but accusatorial, those who make charges have to state, right at the beginning, what those charges are and on what facts they are based. The reason being that, on a motion for an interlocutory injunction it is essential, for the purposes of seeing whether it should be granted, for the Court to know the nature of the allegations which the plaintiff was making, for until at least a statement of claim has been delivered the Court could seldom know what the matters in question in the action were. It cannot be right therefore, for a plaintiff to commence his action without knowing what form his statement of claim would take until the interlocutory proceedings are completed.

An application for an interim injunction is not normally entertained by the Courts without the concurrent filing of a specially endorsed claim, save in exceptional cases of great urgency, and even then, upon Counsel's undertaking to file the claim as soon as possible thereafter. And, it is this Court's view that in the event that an interim injunction is granted under such special circumstances, the details of the plaintiff's claim ought to be filed well within the 14 days life span (under the new rules) of the interim injunction. I would even go further to say that, as the relief of injunction is an equitable remedy and *laches* on the part of a party affects such remedy, a default in filing the plaintiff's claim within the 14 days period ought - considering the circumstances of such granting of interim injunction - to be deemed an inordinate delay.

Presumably, in the current case, the granting of the interim injunction must necessarily have been based on this implicit undertaking by the plaintiff to file his claim as soon as possible. The plaintiff's explanation, for this delay in filing the statement of claim, that there were ongoing negotiations for settlement between the parties served only to reinforce this Court's suspicion that the then primary aim of the plaintiff's action in filing only the generally indorsed writ of summons (Encl.1) was to secure an interim injunction and thereafter to wait to see what he could get from the defendant.

This is truly an unfortunate case replete with unexplained circumstances and conduct of Counsel which the Court ought not to condone.

In the event, I allowed the defendant's application (under Enclosure 62) to strike out the plaintiff's claim and costs of the action and this application to be taxed (unless agreed) was awarded to the defendant.